92-145

No. 92-——

Supreme Court, U.S.
FILED
JUL 22 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARRY EDWARD STONE,
Petitioner,

v.

JOHN SHAW and ROBERT BUTTERWORTH,
Attorney General, STATE OF FLORIDA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

ROBERT J. BUONAURO, P.A.
14 E. Washington Street
Suite 602
Orlando, Florida 32801
(407) 841-1940
Attorney for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

82

QUESTIONS PRESENTED FOR REVIEW

Was the Petitioner's Sixth Amendment Right of Confrontation in a sexual battery case violated when the Trial Court allowed over objection, the admission of hearsay testimony of the child/victim through the testimony of the child's mother and her friend.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
OPINION BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTION AND STATUTE INVOLVED	2
STATEMENT OF THE CASE AND FACTS	5
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	20

TABLE OF AUTHORITIES

CASES Page

Davis v. Alaska, 415 U.S. 308 (1974) 16
Deleware v. VanArsdale, 475 U.S. 673 (1986) 16
Fenelon v. State, 17 FLW S112 (Fla. 1992) 19
Idaho v. Wright, 947 U.S. ——, 111 L.Ed.2d 638, 110 S.Ct. 3139 (1990) 14
Kopko v. State, 577 So.2d 956 (Fla. 5th DCA 1991) 17
Ohio v. Roberts, 448 U.S. 66, 65 L.Ed.2d 597, 100 S.Ct. 2531 (1980) 18
Pardo v. State of Florida, 17 FLW S194 (Fla. 1992) 16
Stone v. State, 547 So.2d 657 (Fal. 2d DCA 1989) 5
United States v. Inadi, 475 U.S. 387, 89 L.E.2d 390, 106 S.Ct. 1121 (1986) 18
Williams v. Florida, 378 So.2d 902 (Fla. 5th DCA 1980) 19

CONSTITUTION, STATUTES AND RULES

United States Constitution Amendment Five 2
United States Constitution Amendment Six 2
United States Constitution Amendment Fourteen 3
Florida Statute Sec. 90.803 3
Florida Statute Sec. 90.403 4
Federal Rules of Evidence 403 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92- ———

HARRY EDWARD STONE,
Petitioner,

v.

JOHN SHAW and ROBERT BUTTERWORTH,
Attorney General, STATE OF FLORIDA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Opinion of the Florida State Appellate Court of *Stone v. State of Florida*, 547 So.2d 657 (Fla. 2nd DCA 1989) appears in the Appendix at (App. E, p. 27a).

Petitioner Mr. Stone's Writ of Habeas Corpus appears in the attached Appendix (App. D, p. 9a).

The Report and Recommendation of the United States Magistrate pertaining to the Petition for Writ of Habeas Corpus is found in (App. C, p. 4a).

Order of the District Court for the Middle District of Florida accepting the findings of the Report and Recommendation of the Magistrate is found in (App. B, p. 2a).

The Decision of the United States Court of Appeals for the Eleventh Circuit, rendered March 17, 1992 and the Order Denying the Petition for Rehearing rendered April 24, 1992 are found in Appendix (App. A, p. 1a, and App. F, p. 34a).

JURISDICTIONAL STATEMENT

The Judgment of the United States Court of Appeal for the Eleventh Circuit, was entered on August 17, 1987. This Court has jurisdiction pursuant to 28 U.S. Code Sections 1254(1). Rule 10(1)(a), Supreme Court Rules.

CONSTITUTION AND STATUTE INVOLVED

Amendment Five, United States Constitution:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment Six, United States Constitution:

> In criminal prosecutions, the accused shal enjoy the right to a speedy and pubic trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and causes of the accusations; to be confronted with witnesses against him; to have compulsory proc-

ess for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

Amendment Fourteen, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Florida Statute Section 90.803(23) Hearsay Exception; Statement of child/victim:

> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:
>
> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. is unavailable as a witness, provided that there is other corroborative evidence of the abuse of offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to section 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for it's ruling under this subsection.

Florida Statute, Section 90.403

Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

Federal Rule 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue

delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE AND FACTS

The Petitioner was charged by the State of Florida in Indictment with one count of capital battery, a violation of Florida Statute 794.011(2). (App. G, 35a/36a)

The Indictment alleged that the Petitioner *Mr. Stone* placed his penis or mouth on the vagina of the child victim. The incident is alleged to have occurred sometime between November of 1984 and November of 1985. *Mr. Stone* was convicted on June 12, 1987 and was sentenced on the capital felony on August 7, 1987 to life imprisonment with a mandatory 25 year prison sentence before becoming eligible for parole consideration. *Mr. Stone* remains incarcerated. This conviction was appealed to the Second District Court of Appeals and the conviction was affirmed on May 26, 1989, found at *Stone v. State*, 547 So.2d 657 (Fla. 2nd DCA 1989). App. E, p. 27a)

Following *Mr. Stone's* affirmance in the State Appellate Court, he filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida, Tampa Division, Case No. 90-1365-CIV-T-98C (App. D, p. 9a). An order denying the Petition entered on April 25, 1991. (App. B, p. 2a)

On June 18, 1991, United States District Court entered an order upon *Mr. Stone's* application for certificate of probable cause certifying that he had probable cause to proceed with his appeal to the Eleventh U.S. Court of Appeals. The United States Court of Appeals for the Eleventh Circuit in Case No. 91-3420 affirmed the District Court's findings on March 17, 1992 (App. A, p. 1a)

The State in it's proof alleged that the incident occurred sometime in October of 1985. At the time of the incident, the six year old child victim's parents were divorced and she lived with her mother. She occasionally spent the night at her father's home. The incident occurred while *Mr. Stone* was baby sitting the child victim at her father's home. *Mr. Stone* was the 19 year old brother of the child victim's father's girlfriend. (App. H, pp. 41a/46a-49a)

The victim child testified at trial. She was 8 years old at the time of the trial. She testified that *Mr. Stone* got on top of her when she was in bed and that this act hurt her private. (App. H, pp. 41a/49a)

She could not define the word "private". She was uncertain whether her private was below her waist. She could not remember who taught her the word. (App. H, pp. 49a/52a)

The victim child's mother testified that she had taught the word to the child to describe her genital area. (App. H, p. 42a)

The child also testified that *Mr. Stone* had licked her private. She stated that *Mr. Stone* placed a wash cloth on her private before he licked it. (App. H, pp. 49a/50a)

The child testified she did not know what she had on when he licked her private. (App. H, p. 51a)

She then testified that when *Mr. Stone* got on top of her she did not know whether she had her clothes on or off. (App. H, p. 51a)

Additionally she testified she had on a nightie and some underpants. (App. H, pp. 51a-52a)

She did not remember if *Mr. Stone* took her underpants off. (App. H, p. 52a)

On cross-examination, the victim child indicated it had happened more than twice, when in her deposition she

could only remember 2 times. (App. H, p. 50a) When questioned about the first time, she said it was when *Mr. Stone* was driving in her dad's truck. However, she did not know what happened in the truck, but later stated "nothing happened". (App. H, p. 50a)

The second time she was assaulted she stated it happened in the living room and he licked her private. In her deposition testimony, she did not remember what happened in the living room. (App. H, p. 51a)

The sexual assault was to have happened in her sister's room when *Mr. Stone* allegedly got on top of her and licked her private. The victim child stated he put a wash cloth on her first. In her deposition testimony, the only thing she could recall about the activities in her sister's bedroom was that *Mr. Stone* told her sister to turn around when he got on top of her. (App. H, p. 49a) Furthermore, she could not remember what *Mr. Stone* did to her when he got on top of her. (App. H, p. 52a)

She could not remember who else she had talked to about the allegations. She denied telling her friends what happened. She did not know whether her mother or her boyfriend had told her what to say in court (App. H, pp. 50a/52a) On re-direct examination, the state read several questions and answers from her deposition, in which she said that she felt *Mr. Stone's* private when he was on top her her. App. H, p. 52a) Over objection, the child's mother was allowed to testify to hearsay statements that the child made. She stated that the child told her that *Mr. Stone* had gotten on top of her and put his private between her legs. That *Mr. Stone* took his clothes off as well as the child's. She said she asked her child if she had gotten wet or anything like that and she replied she had. (App. H, p. 42a)

The child's mother testified that during several other conversations she had with her child, that the child told her that *Mr. Stone* had put his mouth on her private

area. The mother acknowledges that much of these conversations between her and her child were brought out during counseling and also by her trying to help the child understand that it wasn't her fault. (App. H, pp. 42a/43a)

On cross-examination, the mother was impeached by the absence of allegations of "private, between the legs" and the "getting wet" in her deposition. With respect to the testimony regarding "wetness" defense counsel asked "did you suggest that to her, or did she talk about it herself?" She replied, "if I'm not mistaken, that may have been said through counseling, I can't remember exactly when it was said." (App. H, pp. 43a/44a)

The State of Florida also had the victim child's mother testify about behavioral changes that she had noticed in the child. She noted that the child started having bad dreams and would wake up in the middle of the night and come to her bedroom in tears. She also noted that the child was afraid to go to the father's house.

The child victim's girlfriend Lisa Boger over objection was allowed to testify that the child told her that *Mr. Stone* had put his mouth all over her private. She was not sure if she suggested that to the victim or if the victim had said it on her own. (App. H, p. 44a)

On cross-examination, Boger stated that the child's initial allegation was that *Mr. Stone* had gotten on top of her and had his mouth on her private parts. When asked if she was sure of the testimony, she replied that she thinks the child told her that *Mr. Stone* had his mouth on her private parts. She further stated she was pretty sure that the child stated that. (App. H, p. 44a)

Boger further testified that the child said it happened more than once. In her deposition however, she stated the child said it happened only once. App. H, p. 45a)

Additionally in her deposition, Boger stated that the child never told her any details of the assault other than

the fact that *Mr. Stone* had gotten on top of her while they were both undressed. (App. H, p. 45a)

After Boger testified, but before the victim child testified, the Court cautioned the prosecution to keep the children separate. The Court stating with reference to the girlfriend Boger's testimony, "this is one sharp little cookie." At this point the trial recessed for the day. (App. 46a) Upon reconvening the trial the next day, defense counsel brought to the court's attention that the two children were playing cards in the witness room. The court made no inquiry as to any violation of the court's order. (App. H, p. 46a)

The Petitioner *Mr. Stone* testified at trial. He admitted that he had baby sat for the victim on approximately 3 occasions. He denied however, that he engaged in any form of sexual conduct with her and denied he had ever used a wash cloth on her for any purpose. (App. H, pp. 52a/53a)

Mr. Stone in his Petition for Writ of Habeas Corpus filed in the District Court, maintained that the state trial judge erred in allowing hearsay testimony through the child's mother and girlfriend in evidence over objection. Furthermore, *Mr. Stone* maintained that the state trial court erred in allowing the testimony without following the mandates of the evidence code, Florida Statute 90.803.(23) F.S. (1987). (See pp. 3/4)

Prior to trial, the state filed a Notice of Intent to use the child's hearsay statements under the above-mentioned statute. During the course of the trial, but out of the presence of the jury, the state proffered the hearsay testimony. All parties appeared uncertain as to exactly how to handle the proffered hearing. (App. H, pp. 37a-41a)

In the proffer, the child's mother testified and the child's friend Boger testified.

Mr. Stone objected to the proffered testimony. The trial judge, although expressing concern over how much influence the mother had over the child's friend, the court overruled the Petitioner's objection. The findings of fact required by the child hearsay statute were not made. (App. H, pp. 39a-41a)

The trial judge as previously noted, stated he wanted the two girls separated and that he found the friend was "a sharp cookie" and was "on the ball". (App. H, p. 46a)

The court additionally agreed that the child victim was "susceptible to influence." (App. H, p. 47a)

During the course of trial testimony, the state introduced the testimony of detective Trehy to establish a predicate for an instruction on flight that in an attempt to interview the Petitioner, staked out the Petitioner's home. He would sit down the street in his car waiting to see if the Petitioner would show up at his parents house. He never was able to locate *Mr. Stone.*

In the course of *Mr. Stone's* testimony, he admitted leaving the state of Florida and going to live in California with his sister about 2 to 3 weeks after the complaint was made. He stayed in California for approximately a year. He stated that the police never came to his house and never attempted to question him as far as he knew. He did not know the police were looking for him until he returned home. (App. H, pp. 53a-56a)

REASONS FOR GRANTING THE WRIT

Was the Petitioner's Sixth Amendment Right of Confrontation violated in a sexual battery case when the Trial Court allowed over objection, the admission of hearsay testimony of the child victim through the testimony of the child's mother and her friend.

The Petitioner *Mr. Stone* maintains in the United States District Court for the Middle District of Florida, that the hearsay testimony of the victim's mother and the girlfriend cannot be justified as a hearsay exception, and that the hearsay testimony was totally unreliable based upon the facts of the case.

The hearsay testimony complained about was critical to the prosecution's case. The child victim's testimony was so weak, that without the hearsay testimony, a conviction could not have been had in the cause. The Petitioner maintains that the impact of this testimony was strengthened with the trial judge's comment on the evidence, in its instruction to the jury on "flight" which has subsequently been held to be an improper procedure in the state of Florida, all resulted in an illegal conviction.

Mr. Stone maintains that had the trial court properly considered the criteria set forth in Florida Statute Section 90.803(23) (1987), that being;

> "unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness,"

the hearsay statement of the child victim who testifies at trial are admissible if the trial court finds "the time, content, and circumstances of the statement provides sufficient safeguards of reliability;" the court would have found therefore, that the confrontation clause of the United States Constitution would have prohibited the use of such evidence to convict *Mr. Stone.*

Mr. Stone maintains that the District Court erred in finding that although the child's mother and friend's testimony concerning statements made to them by the child victim were technically hearsay, the Appellant's right to confrontation was not violated where the victim testified and was subject to cross-examination.

Mr. Stone maintains that his Sixth Amendment Right of Confrontation was violated and as a result should be entitled to a new trial.

Mr. Stone was charged in the state court with a capital sexual battery of a six year old child. At the time of the trial, and when the child testified, she was eight years of age. It is *Mr. Stone's* contention that as a result of the inadmissible hearsay testimony, that being the testimony of the child's mother and the child's friend that his Sixth Amendment Right of Confrontation was violated and furthermore was denied a fair and impartial trial. This error was enhanced by the improper instruction on flight.

There was no medical evidence to support the child's allegations of a sexual battery. The sum total of the state's evidence was the child's testimony that *Mr. Stone* had gotten on top of her when she was in bed and that he hurt her "private". She could not define the word private and was uncertain as to whether it was below her waist. She could not recall who taught her the word. The child's testimony was repeated through her mother's statements and the child's friend's statements at trial. By repeating the child's testimony through the older witnesses, the child's testimony was given a false sense of credibility especially in view of the fact that there was no evidence to corroborate the child's testimony.

Mr. Stone initially points out to this Honorable Court that he is not simply complaining about the sufficiency of the trial court's findings as required by Florida Statute 90.803(23), F.S. (1987). *Mr. Stone's* contention deals

with his continuing objection to the hearsay testimony of the child victim's mother and her friend.

Mr. Stone contends that the testimony of the child victim would not have been sufficient to sustain a conviction of a capital sexual battery requiring a life imprisonment with a 25 year mandatory jail sentence before parole. The child's testimony is fraught with inconsistencies. On cross-examination, the child indicated that the incident happened more than twice and in her deposition she could only remember two times. With reference to the second time, the sexual assault occurred, she said it happened in the living room and that *Mr. Stone* licked her private part. In her deposition testimony, she did not remember what happened in the living room. With reference to the sexual activity in her sister's room, she testified that *Mr. Stone* had gotten on top of her and licked her private but put a wash cloth on it first. The only thing she remembered with reference to the sexual activity in her sister's bedroom during the deposition was that *Mr. Stone* told her sister to turn around and then he got on top of her.

She furthermore denied telling her friends what happened and did not know whether her mother or her friends told her what to say in court.

This testimony in and of itself would not have supported a conviction. However, this testimony corroborated by the objectionable hearsay testimony of the mother and child's friend severely prejudiced *Mr. Stone* and denied him his right of confrontation. The weakness of the child's testimony and the obvious inaccuracies apparently concerned the state appellate court as it found it necessary to specifically comment on the same in its opinion wherein it stated:

> "We are concerned by the fact that the victim could not precisely define the area of her body which she understood to be her private. Her shyness and

> embarrassment on the witness stand were completely natural, but there are not a substitute for direct evidence. We find however, that the jury could reasonably infer from the evidence that the defendant made contact between his mouth and the sexual organ of the victim." *Stone v. State*, 547 So.2d 657, 658 (Fla. 2nd DCA 1989). (App. E, p. 29a)

Mr. Stone questions as to what evidence the jury could have reasonably inferred that he had sexual contact with the victim. The jury had to rely on the corroborating inadmissible hearsay testimony of the mother and friend. The District Court's findings are in direct conflict with decisions rendered by this Honorable Court and various United States Courts of Appeal as well as Florida State Supreme Court.

In *Idaho v. Wright*, 947 U.S. ——, 111 L.Ed.2d 638, 110 S.Ct. 3139 (1990), this Honorable Court dealt with Idaho's Residual Hearsay Exception Statute. In *Wright*, a mother was charged with two counts of lewd conduct with a minor under 16, arising out of an alleged sexual intercourse between the co-defendant and her daughters. *Wright's* older daughter reported that the co-defendant had sexual intercourse with her and her sister while Wright held her down and covered her mouth. After these reports, both children were examined by physicians. One physician with extensive experience in child abuse cases examined the younger child in his office and found conditions strongly suggesting sexual abuse and vaginal contact in the previous two or three days. The younger child was deemed incapable of communicating to the jury which was not objected to by defense counsel. Having thus become unavailable as a witness, the pediatrician testified regarding statements made to him by the younger daughter. The statements basically involved answers to his questions. The trial court admitted these statements under the Idaho Residual Hearsay Exception. The Idaho Supreme Court reversed the conviction because the statements lacked the particularized guarantee of trustworthiness necessary to

satisfy the requirements of the confrontation clause. The court in ruling that the child's statements lacked "particularized guarantees of trustworthiness" pointed out that the pediatrician who conducted the interview, did so without procedural safeguards, in that he failed to video tape the interview, he asked leading questions, and had a preconceived idea what the child should be disclosing.

In affirming the lower court's granting of a new trial, this Honorable Court began with a review of important principles underlying a criminal defendant's right to confrontation.

The Eleventh United States Court of Appeals maintains that the present case is distinguishable from *Wright*, supra, in that *Mr. Stone's* case, the child victim testified and was subject to cross-examination by *Mr. Stone*. The Eleventh Circuit goes on to state in adopting the District Court's findings that if any error occurred in admitting the hearsay statements, *Mr. Stone's* confrontation rights were not violated in view of the fact that the child victim testified and was subject to cross-examination.

This Honorable Court in *Wright*, pointed out that the presumption of unreliability attending such out of court statements and the suggestive manner in which the interview was conducted, rendered them unconstitutional. This court stated:

> "If there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be in an inaccurate indicator of trustworthiness." (At page 659)

Mr. Stone would argue that the general principles of the Sixth Amendment Right of Confrontation cannot be summed up as simply as the Court of Appeals indicates in its ruling, that when the victim testified, the obvious hearsay testimony of the mother and friend was not prejudicial since the child was subject to cross-examination.

The Sixth Amendment Confrontation Clause guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The United States Constitution Amendment Six, Confrontation means more than being allowed to confront the witness physically. *Davis v. Alaska*, 415 U.S. 308, 315 (1974). A criminal defendant shows a violation of the confrontation clause "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Deleware v. VanArsdale*, 475 U.S. 673, 680 (1986).

As a result of the unusual problems that arise in child rape cases, various state legislations have passed such statutes as F.S. 90.803(23) which provides the method for the introduction of hearsay statements or prior consistent statements as the case may be. (See p. 3)

The current trend as to the use of these prior consistent statements in Florida is now that the child victim's hearsay statements which qualifies for stautory exception may be admissible in evidence when the child is able to testify fully at trial, notwithstanding its characterization as a prior consistent statement. Therefore, pursuant to F.S. 90.803(23), if reliable, a child's victim's hearsay is not excludable per se as hearsay, or as a prior inconsistent statement even though the child testifies at trial. However, the test does not stop there. The Courts must then apply F.S. Section 90.403 similar to the Federal Rules of Evidence 403, that the court must examine the testimony and weigh its reliability and probative value of the child's hearsay statement against the danger that the statement will unfairly prejudice the defendant, confuse the issues at trial, mislead the jury or result in the presentation of needless cumulative evidence. See *Pardo v. State of Florida*, 17 FLW S194 (Fla. 1992) (For text of 90.403 or F.R.E. 403, See pp. 415)

It is important to realize that the Florida Supreme Court encourages a balancing test by applying Rule 403.

The court in reporting from the decision of *Kopko v. State*, 577 So. 2d 956 (Fla. 5th DCA 1991) points out that by having a child testify and then routing the child's words through respected adult witnesses such as doctors, psychologists (child protection team) specialists, police and the like, with the attendant sophistication of vocabulary and description, *there would seem to be a real risk that the testimony will take on an importance or appear to have an imprimatur of truth far beyond the content of the testimony.*

The state appellate court, was obviously concerned with the legal sufficiency of the child victim's testimony, especially in view of the fact that she would not define what her "private" was. Her testimony was corroborated through the prior consistent statements of her mother and her friend, especially the mother wherein the mother testified that she had taught the child the word private in reference to her gentila. An inference of hearsay upon hearsay, with reference to the allegation that he placed his private between her legs, the mother testified that this has been brought out through counseling.

There was virtually no evidence to corroborate the testimony of the alleged victim or that of *Mr. Stone's*. Only the victim's version of the events was allowed to be repeated through these different witnesses.

Credibility certainly was an issue. We had the uncorroborated testimony of the child victim versus the uncorroborated testimony of *Mr. Stone*. The U.S. Court of Appeals cannot simply find that the confrontation rights of Mr. Stone were not violated because the child victim testified and was subject to cross-examination. Initially it was an extremely difficult task to cross-examine the prior consistent hearsay statements especially those being attributed to an 8 year old victim. Regardless of the fact that the prior consistent statements were subject to vigorous cross-examination, the fact remains

that the repetitiveness would give some credence to the victim's testimony as pointed out by the Florida Supreme Court. The Federal Rule of Evidence 403 and Section 90.403 F.S. would exclude such evidence.

The U.S. Court of Appeal, Eleventh Circuit's decision is direct conflict with the decision of this Court in the case of *Ohio v. Roberts*, 448 U.S. 66, 65 L.Ed.2d 597, 100 S. Ct. 2531 (1980) wherein this court stated:

> "In conformance with the framers" preference face to face accusation, the confrontation clause establishes a rule of necessity. Including cases where prior cross-examination has occurred, the prosecution must either produce, or demonstrate the unavailability of a declarant whose statement it wishes to use against the defendant."

The *Robert's* court went on to address the problem of the unavailable declarant, noting there is not a confrontation clause violation if the declarant's statements carry "sufficient indicia of reliability" even though the declarant is not produced at trial. (44 U.S. at 65-66)

Six years after *Roberts's*, it's holding was clarified by this Honorable Court in *United States v. Inadi*, 475 U.S. 387, 89 L.Ed.2d 390, 106 S.Ct. 1121 (1986). In *Inadi* the court stated:

> "If the declarant is available and the same information can be presented to the trier of the fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, the long standing principle of hearsay, applicable as well to the confrontation clause analysis, favor the better evidence. (475 U.S. at 394)

There is no question in this case that the child victim did testify. There was no necessity to bring in the hearsay witnesses because "the better evidence" was available and presented to the jury. The introduction of the

hearsay testimony violated *Mr. Stone's* right under the confrontation clause.

It has been argued to this court that the uncorroborated testimony of the child victim established its credibility through that of the hearsay testimony of the child's mother and girlfriend. Additionally, by the trial judge instructing the jury on the "alleged flight of *Mr. Stone*", such instruction and comment on the evidence further strengthened and gave credence to the victim's testimony. The Judge instructed the jury as follows:

> "Now, although the flight of a person during the commission of a crime or from a crime scene places no presumption of guilt, it may be considered along with all other testimony and circumstances as a circumstance from which guilt may be inferred." (Trial Transcript, Pg 325)

A flight instruction should only be given when evidence of flight is clearly established. *Williams v. Florida*, 378 So.2d 902, 903 (Fla. 5th DCA 1980). The current state of law in *Florida* is set forth in a recent Florida Supreme Court decision of *Fenelon v. State*, 17 FLW S112 (Fla. 1992) wherein the Florida Supreme Court stated in all future cases where evidence of flight has been properly admitted, the better policy is to reserve comment to counsel with the jury instruction on flight not being given.

Additional compelling precedence warranting the issuance of this Petition for Writ of Certiorari are the following:

A. The Fifth Amendment: in that no person shall be deprived of life, liberty or property without due process of law.

B. The Sixth Amendment: in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him and to have the assistance of counsel for his defense.

C. The Fourteenth Amendment: no state shall make up or enforce a law which shall abridge the privileges or immunities of the citizens of the United States nor shall any state deprive a person of life, liberty or property without due process of law nor deny any other person within its jurisdiction equal protection of the law. These various bill of rights were established as the preamble to the United States Constitution, that is "to form a more perfect union, to establish justice . . ." The establishment of justice does not mean to those select few. It means to all and it means to all equally.

CONCLUSION

It is most respectfully urged that this Honorable Court should grant the Writ of Certiorari for the following reasons:

In that the Fifth, Sixth and Fourteenth Amendments to the United States Constitution would prohibit sustaining a conviction by the use of such inadmissible hearsay testimony ruled admissible in the state trial court proceedings.

ROBERT J. BUONAURO, P.A.
14 E. Washington Street
Suite 602
Orlando, Florida 32801
(407) 841-1940
Attorney for Petitioner

Dated: July —, 1992

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3420
Non-Argument Calendar

D. C. Docket No. 90-1365-Civ-T-98c

HARRY EDWARD STONE,
Petitioner-Appellant,

versus

JOHN L. SHAW, ROBERT A. BUTTERWORTH,
Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(March 17, 1992)

Before TJOFLAT, Chief Judge, HATCHETT, and DUBINA, Circuit Judges.

PER CURIAM:

The judgment of the district court denying habeas corpus relief is affirmed for the reasons stated in the report and recommendation of the magistrate judge which the district judge adopted.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No: 90-1365-CIV-T-3A98C

HARRY EDWARD STONE,
Petitioner,

vs.

JOHN SHAW, and ROBERT BUTTERWORTH,
Respondents.

ORDER

[Filed Apr. 25, 1991]

THIS CAUSE comes on for consideration upon the magistrate's report and recommendation recommending that the above styled petition be dismissed with prejudice. All parties previously have been furnished copies of the report and recommendation and have been afforded an opportunity to file objections pursuant to Section 636(b)(1), Title 28, United States Code.

Upon consideration, of the report and recommendation of the magistrate, all objections thereto timely filed by the parties and upon this court's independent examination of the file, it is determined that the magistrate's report and recommendation should be adopted.

Accordingly, it is now

ORDERED:

(1) The magistrate's report and recommendation is adopted and incorporated by reference in this order of the court.

(2) The petition for writ of habeas corpus is hereby DISMISSED with prejudice.

DONE and ORDERED at Tampa, Florida this 25th day of April, 1991.

/s/ Wm. Terrell Hodges
WM. TERRELL HODGES
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No: 90-1365-CIV-T-3A98C

HARRY EDWARD STONE,
Petitioner,

vs.

JOHN SHAW, and ROBERT BUTTERWORTH,
Respondents.

REPORT AND RECOMMENDATION

[Filed Mar. 22, 1991]

THIS CAUSE is before this court [1] for consideration of a petition for writ of habeas corpus filed by a state prisoner pursuant to 28 U.S.C. § 2254. Petitioner was convicted in the Circuit Court for Pinellas County of sexual battery on a child less than 12 years of age following trial.

On direct appeal, the Second District Court of Appeal rejected each of the eight points raised by petitioner, and addressed three of the issues. The appellate court held that: admitting hearsay statements without making specific findings required by a Florida Statute was not fundamental error, failure to conduct a sufficient *Richardson* [2] hearing was not reversible error where adequate

---

[1] This matter has been referred to the undersigned by the district court for consideration and a Report and Recommendation. See Local Rules 6.01(b), and 6.01(c), M.D. Fla.

[2] *Richardson v. State*, 246 So.2d 771 (Fla. 1971).

inquiry into discovery violation was made, and that the evidence was sufficient to support the conviction. *Stone v. State of Florida*, 547 So.2d 657 (Fla. 2d DCA 1989).

The petition presents one ground for relief: that the admission of hearsay testimony of the victim to the mother and her friend was a violation of petitioner's Sixth Amendment right to confrontation. For the reasons stated hereafter, I recommend that the petition be dismissed.

I

Respondent asserts that petitioner has procedurally defaulted the issue presented pursuant to *Wainwright v. Sykes*, 433 U.S. 72 (1977) for failure to object to the hearsay testimony at trial as a confrontation clause violation. Respondent concedes that petitioner did raise a confrontation clause objection to the hearsay testimony on appeal. Respondent's argument is without merit because the opinion by the Second District Court of Appeal did not clearly and expressly state that its disposition of petitioner's claim rested on a state procedural bar. *See Harris v. Reed*, 489 U.S. 255, 262 (1989). Therefore this court is not precluded from reaching the merits of the issue presented.

II

To discuss the confrontation clause issue, a review of the evidence at trial is necessary. The Second District Court of Appeal summarized the evidence as follows:

> The victim testified at trial. She was eight years old at the time of trial. She testified that the defendant "got on top of" her when she was in bed, and that this act hurt her "private." She could not define the word "private." She was uncertain whether her private was below her waist and did not remember who had taught her the word. The victim's mother, however, testified that she had taught the word to the child to describe her "genital area."

> The young child also repeatedly testified that the defendant had "licked" her private. This occurred at night. She said the defendant placed a washcloth on her private before he licked it.
>
> The first person to whom the victim revealed this incident was a girlfriend. The friend was eleven years old at the time of trial. This friend testified that she was staying at the victim's home one night when the victim told her that Mr. Stone had previously taken off her clothes and his clothes, and that he had gotten on top of her and placed his mouth on her private parts. The friend encouraged the victim to tell her mother.
>
> The mother testified that her daughter and the friend had approached her late that evening. Her daughter told her about the incident. Her daughter also told her that the defendant had put his "private between her legs," and that she had gotten wet between her legs.

Stone v. State of Florida, supra, at 658.

Petitioner claims that the admission of the hearsay statements by the victim to the mother and friend violated his right of confrontation. Petitioner relies on the case of *Idaho v. Wright,* 110 S. Ct. 3139 (1990). *Wright* was a sexual abuse case involving a minor who was determined by the court to be incapable of communicating to the jury. Statements made by the minor were consequently elicited at trial through the testimony of the examining pediatrician. The Supreme Court affirmed the reversal of the conviction by the Idaho Supreme Court because the statements lacked the particularized guarantee of trustworthiness necessary to satisfy the requirements of the confrontation clause.

The facts of the present case are distinguishable from *Wright* in that in this case, the victim/declarant testified and was subject to cross-examination by petitioner.

A general approach to the confrontation clause was mapped out by the Supreme Court in *Ohio v. Roberts*, 448 U.S. 56 (1979).[3] The Court held that the Sixth Amendment established a rule of necessity whereby the prosecution "must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* at 65. The Court further stated that "[i]n sum, when a hearsay declarant is *not present for cross-examination* (emphasis added) at trial, the Confrontation Clause normally requires a showing that he is unavailable." *Id.* at 66. Two decisions by the former Fifth Circuit which are binding precedent in the Eleventh Circuit, *see Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*), squarely address the issue presented in this case.

In *United States v. Williamson*, 450 F.2d 585 (5th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972) the former Fifth Circuit held that the testimony of a government agent as to statements made by an undercover agent, although hearsay, were not prejudicial where the undercover agent testified and was subject to cross-examination.

In the subsequent case of *United States v. Wilkerson*, 469 F.2d 963 (5th Cir. 1972), *cert. denied*, 410 U.S. 986 (1973), the court held that even though hearsay statements were improperly admitted under the co-conspirator exception, where the co-conspirator was actually a government agent, no reversible error was committed in admitting the statement where the agent who made it testified at trial and was cross-examined. The *Wilkerson* court cited with approval the following language from *Williamson*:

---

[3] The *Roberts* decision was based in part on dicta contained in *California v. Green*, 399 U.S. 149, 161 (1970) which indicated that the confrontation clause is not violated where the declarant testifies at trial and is available for cross-examination concerning the hearsay statements.

> [T]he general rule against the admission of hearsay testimony is in large part grounded upon the absence of an opportunity to cross-examine the out-of-court declarant and to confront him on the witness stand. If hearsay is to be excluded mainly for those reasons, its introduction—despite its technical inadmissibility —is not necessarily prejudicial if the defendant is afforded the opportunity to challenge in court the person whose statements have been related.

Wilkerson, supra, at 968 (citation omitted).

The court went on to hold that admission of the statement, even if it was hearsay, did not violate the defendant's right to confront the witnesses against him where the declarant testified and was cross-examined at trial. *Id.*

Conclusion

Although the mother and friend's testimony concerning statements made to them by the victim were technically hearsay, the petitioner's right to confrontation was not violated where the victim testified and was subject to cross-examination by the petitioner. It is therefore RECOMMENDED that:

(1) the petition for writ of habeas corpus be dismissed with prejudice.

/s/ Elizabeth A. Jenkins
ELIZABETH A. JENKINS
United States Magistrate Judge

Dated: March 22nd, 1991.

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. 28 U.S.C. 636(b)(1).

APPENDIX D

FORM FOR USE IN APPLICATIONS FOR HABEAS CORPUS UNDER U.S.C. § 2254

NAME: HARRY EDWARD STONE

PRISON NUMBER: 108558

NAME AND PLACE OF CONFINEMENT:
Desota Correctional Institute

ADDRESS OF PLACE OF CONFINEMENT:
P.O. Drawer 1072, Arcadia, Fla. 33821

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Case No. ———

HARRY EDWARD STONE,
Petitioner

vs.

JOHN SHAW, Superintendent,
Respondent

and

THE ATTORNEY GENERAL OF THE STATE OF FLORIDA,
ROBERT A. BUTTERWORTH,
Additional Respondent.

(If petitioner is attacking a judgement which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgement was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgement.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

INSTRUCTIONS—READ CAREFULLY

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and subscribed to under penalty of perjury as being true and correct. Any false statement of a material fact may serve as the basis for prosecution and conviction of perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any questions use reverse side of sheet.

(2) Additional pages are not permitted, except that the *facts* (not case citations) which you rely upon to support your grounds for relief may be set forth on additional pages. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis*, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis*, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $25.00, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the

same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, *the original and two copies* must be mailed to the Clerk of the United States District Court whose address is:

Rm. 611, U.S. Courthouse & FOB, 80 North Hughey Avenue, Orlando, Florida 32801

(8) *Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.*

PETITION

1. Name and location of court which entered the judgment of conviction under attack Sixth Judicial Circuit in and for Pinellas County, Clearwater, Florida

2. Date of judgment of conviction Conviction June 12, 1987
Sentencing August 7, 1987

3. Length of sentence Capital felony, life imprisonment with a 25 year mandatory parole eligibility

4. Sentencing judge Thomas E. Penick

5. Nature of offense or offenses for which you were convicted:

Capital Sexual Battery of a child under age 12, a violation of F.S. 794.011(2)

6. What was your plea? (Check one)

(a) Not guilty (X)

(b) Guilty ( )

(c) Nolo contendere ( )

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: ———————

7. Kind of trial: (Check one)

   (a) Jury (X)

   (b) Judge only ( )

8. Did you testify at the trial? Yes (X) No ( )

9. Did you appeal from the judgment of the conviction?
   Yes (X)
   No ( )

10. If you did appeal, answer the following:

    (a) Name of court District Court of Appeal, Second District, Florida

    (b) Result Conviction affirmed

    (c) Date of result May 26, 1989

    If you filed a second appeal or filed a petition for certiorari in the Florida Supreme Court or the United States Supreme Court, give details:

11. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

CAUTION:

In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request

action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by a plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequence of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(e) Conviction obtained by violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one:

Conviction was obtained in violation of Petitioner's Sixth Amendment Rights which provide in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.

Supporting *FACTS* (tell your story *briefly* without citing cases or law): See Attached Appendix "A" Facts in support of Ground 1

Exhaustion of ground one in the state courts:

(1) Did you raise ground one in the appropriate Florida District Court of Appeal on a direct appeal of your conviction?

Yes (X) No ()

(2) After your conviction did you raise ground one in the state circuit court that sentenced you by filing a Florida Rule 3.850 Motion to Vacate, Set Aside, or Correct Sentence?

Yes ( ) No (X)

(a) If your answer is "yes," then state:

i. Whether you received an evidentiary hearing

ii. The result

iii. The date of the result

(b) If your Rule 3.850 Motion was denied, then did you file an appeal of that denial with the appropriate Florida District Court of Appeal?

Yes ( ) No ( )

i. If you failed to appeal the denial of your Rule 3.850 motion, then explain briefly why you did not

---

(3) Have you raised ground one in any other petition, application, or motion filed in the state courts of Florida?

Yes ( ) No (XX)

If your answer is yes, then give the details, including the grounds raised, the court's decision, and the date of said decision for each such petition, application, or motion

No other Petitions, Applications or motions other than the direct appeal of Ground One

B. Ground two:

Supporting *FACTS* (tell your story *briefly* without citing cases or law):

_____

_____

Exhaustion of ground two in the state courts:

(1) Did you raise ground two in the appropriate Florida District Court of Appeal on a direct appeal of your conviction?

Yes ( ) No ( )

(2) After your conviction did you raise ground two in the state circuit court that sentenced you by filing a Florida Rule 3.850 Motion to Vacate, Set Aside, or Correct Sentence?

Yes ( ) No ( )

(a) If your answer is "yes", then state:

i. Whether you received an evidentiary hearing

ii. The result

iii. The date of the result

(b) If your Rule 3.850 Motion was denied, then did you file an appeal of that denial with the appropriate Florida District Court of Appeal?

Yes ( ) No( )

i. If you failed to appeal the denial of your Rule 3.850 motion, then explain briefly why you did not

_____

_____

(3) Have you raised ground two in any other petition, application, or motion filed in the state courts of Florida?

Yes ( ) No ( )

If your answer is yes, then give the details, including the grounds raised, the court's decision, and the date of said decision for each such petition, application, or motion

_____

_____

C. Ground three:

Supporting *FACTS* (Tell your story *briefly* without citing cases or law):

_____

_____

Exhaustion of ground three in the state courts:

(1) Did you raise ground three in the appropriate Florida District Court of Appeal on a direct appeal of your conviction?

Yes ( ) No ( )

(2) After your conviction did you raise ground three in the state circuit court that sentenced you by filing a Florida Rule 3.850 Motion to Vacate, Set Aside, or Correct Sentence?

Yes ( ) No ( )

(a) If your answer is "yes", then state:

i. Whether you received an evidentiary hearing

ii. The result

iii. The date of the result

(b) If your Rule 3.850 Motion was denied, then did you file an appeal of that denial with the appropriate Florida District Court of Appeal?

Yes ( ) No ( )

i. If you failed to appeal the denial of your Rule 3.850 motion, then explain briefly why you did not

_____

_____

(3) Have you raised ground three in any other petition, application, or motion filed in the state courts of Florida?

Yes ( ) No ( ).

If your answer is yes, then give the details, including the grounds raised, the court's decision, and the date of said decision for each such petition, application, or motion

_____

_____

Ground four:

Supporting *FACTS* (Tell your story *briefly* without citing cases or law):

_____

_____

Exhaustion of ground four in the state courts:

(1) Did you raise ground four in the appropriate Florida District Court of Appeal on a direct appeal of your conviction?

Yes ( ) No ( )

(2) After your conviction did you raise ground four in the state circuit court that sentenced you by filing a Florida Rule 3.850 Motion to Vacate, Set Aside, or Correct Sentence?

Yes ( ) No ( )

(a) If your answer is "yes", then state:

i. Whether you received an evidentiary hearing

ii. The result

iii. The date of the result

(b) If your Rule 3.850 Motion was denied, then did you file an appeal of that denial with the appropriate Florida District Court of Appeal?

Yes ( ) No ( ).

i. If you failed to appeal the denial of your Rule 3.850 motion, then explain briefly why you did not

_____

_____

(3) Have you raised ground four in any other petition, application, or motion filed in the state courts of Florida?

Yes ( ) No ( ).

If your answer is "yes", then give the details, including the grounds raised, the court's decision, and the date of said decision for each such petition, application or motion

_____

_____

12. Other than a direct appeal and other than the post conviction motions disclosed in your answer to ques-

tion 11 above regarding exhaustion of state remedies, have you previously filed *any* petitions, applications, or motions with respect to this judgment and conviction in *any* court, state or federal?

Yes ( ) No (X).

13. If your answer to 12 was "yes", give the following information:

(a) (1) Name of court

(2) Nature of proceeding

(3) Grounds raised

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No ( )

(5) Result

(6) Date of result

(b) As to any second petition, application or motion give the same information:

(1) Name of court

(2) Name of proceeding

(3) Grounds raised

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No ( )

(5) Result

(6) Date of result

(c) Did you appeal to the highest court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes () No ()

(2) Second petition, etc. Yes () No ()

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

_____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes () No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing William Patterson, Esq. 699 1st Avenue North, St. Petersburg, Florida

(b) At arraignment and plea William Patterson, Esq. 699, 1st Avenue North, St. Petersburg, Florida

(c) At trial William Patterson, Esq.

(d) At sentencing William Patterson, Esq.

(e) On appeal Robert Pope, Esq. 2037 1st Avenue, North, St. Petersburg, Florida 33713

(f) In any post-conviction proceeding Robert J. Buonauro, P.A., 14 E. Washington Street, Suite 602, Orlando, Florida 32801 (407) 841-1940

(g) On appeal from any adverse ruling in post-conviction proceedings: _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ( ) No (X)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ( ) No (X)

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) And give date and length of sentence to be served in future:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ( ) No ( )

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I UNDERSTAND THAT ANY FALSE STATEMENT OR ANSWER TO ANY QUESTIONS IN THIS APPLICATION WILL SUBJECT ME TO THE PENALTIES OF PERJURY (A FINE OF $10,000 OR IMPRISONMENT FOR FIVE (5) YEARS, OR BOTH).

I declare that under penalty of perjury that the foregoing is true and correct.

Executed on 10/25/90.
Date

/s/ Harry Stone
Signature

/s/ [Illegible]
Signature of Attorney (If Any)

APPENDIX "A"

FACTS IN SUPPORT OF PETITION

The petitioner was charged by Indictment with one count of capital sexual battery, the Indictment specifically alleged that he placed his penis or his mouth upon vagina of the victim. This incident occurred sometime between November of 1984 and November of 1985. At the time of the incident, the six year old victim's parents were divorced. She lived with her mother, but occasionally spent the night at her father's home. The incident occurred while Mr. Stone was babysitting the victim at the father's home. Mr. Stone, the Petitioner, was the 19 year old brother of the father's girlfriend.

The victim child testified at trial. She was 8 years old at the time of the trial. She testified that the Petitioner got on top of her when she was in bed and that this act hurt her private. She could not define the word private. She was uncertain whether her private was below her waist. Furthermore she could not remember who taught her the word. The victim's mother however, testified she had taught the word to the child to describe her genital area. The child also testified that the Petitioner had licked her private. She stated that the Petitioner placed a wash cloth on her private before he licked it. The child testified she had a nightgown on and underpants. She did not remember if Petitioner took them off.

On cross examination, the child indicated it happened more than twice, when in her deposition testimony she could only remember two times. When queried about the first time she said it was when the Petitioner was driving in my dad's truck. However she did not know what happened in the truck, then she said nothing happened.

The second time it happened she stated it happened in the living room and he licked my private. In her

deposition testimony, she did not remember what happened in the living room. With reference to her testimony as to when it happened in her sister's room, she said that the Petitioner had gotten on top of her and licked my private. He put a wash cloth on me first. It was noted that the only thing she remembered at her deposition about the activities in the sister's room was that the Petitioner told her sister to turn around and he got on top of her. She could not remember what Petitioner did to her when he got on top of her. She denied telling her friends about what happened and she did not know whether her mother or her friend told her what to say in court.

Over objection, the mother was allowed to testify to hearsay statements that the child made. She stated that the child told her that the Petitioner got on top of her and put his private between her legs. That Petitioner took his clothes off as well as the childs'. She said that she asked the child if she had gotten wet or anything like that and she replied she had. The mother further testified that on one of several other conversations she had with the child, she had been told that the Petitioner had put his mouth on her private area. The mother acknowledges that a lot of the conversations between her and the child were brought out during counseling and also by her trying to help the child understand that it wasn't her fault.

With respect to the allegations of the child getting wet between her legs, when the Petitioner put his private between her legs, the mother was asked if she suggested that to the child. The mother replied, "if I am not mistaking that may have even been said through counseling, I can't remember exactly when it was said."

The child's girlfriend, over objection, was allowed to testify that the child told her that the Petitioner put his mouth all over her private part. She was not sure if

she suggested that to her or if the child said it on her own. The girlfriend testified that the child said it happened more than once, however, in her deposition testimony, she stated the child said it happened only once. Furthermore, in her deposition testimony she stated that the child never told her any details other than the fact that the Petitioner got on top of her while both were undressed. After the girlfriend testified, but before the victim child testified, the Court cautioned the prosecution to keep the children separated. The Court stating with reference to the girlfriend, "is one sharp little cookie." Upon reconvening the trial the next day, defense counsel brought to the Court's attention that the two children, the girlfriend and the victim child were playing cards in the witness room. The Court made no inquiry as to the violation of the Court's order.

The Petitioner, Mr. Stone testified at trial. He admitted that he had baby sat for the victim on approximately three occasions. He denied however, that he ever engaged in any form of sexual conduct with her, and denied that he ever used a wash cloth on her for any purpose. Petitioner maintains that the Trial Judge erred in allowing the hearsay testimony of the child's mother and girlfriend into evidence over objection, and furthermore, that the Trial Court allowed the testimony without making any specific finding of facts required by Section 90.803(23) F.S. 1987. This hearsay exception for certain statements of a child victim in a sexual offense requires the Trial Court to conduct a hearing outside the presence of the jury to determine whether the time, content and circumstances of the statements provides efficient safeguards of reliability. The Trial Court is required to make specific findings of fact on the record as to the basis for its ruling. This was not done in the Petitioner's case.

A proffer was had outside the presence of the jury as to the mother and girlfriend's testimony. After hear-

ing the proffer, the Court simply ruled that the testimony would be admissible.

Petitioner maintains that the hearsay testimony admitted through the mother and girlfriend cannot be justified under any hearsay exception, and that this hearsay testimony was totally unreliable based upon the facts of the case. The hearsay testimony complained about was crucial to the prosecution's case. The victim child's testimony was so weak, that without the hearsay testimony a conviction could not have been had in this cause. Had the Trial Court probably considered the time, content and circumstances of the hearsay statements, he would have found that the confrontation clause of the United States Constitution would have prohibited the use of such evidence to convict the Petitioner.

APPENDIX E

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

No. 87-02472

HARRY EDWARD STONE,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

May 26, 1989

Rehearing Denied Aug. 17, 1989

Richard Sanders and Robert W. Pope of Pope & Henninger, St. Petersburg, for appellant.

Robtr A. Butterworth, Atty. Gen., Tallahassee, and Charles Corces, Jr., Asst. Atty. Gen., Tampa, for appellee.

ALTENBERND, Judge.

The defendant raises eight issues on appeal from his conviction for sexual battery on a child less than twelve years of age. We affirm the conviction, and while we reject each of the defendant's points on appeal, we address three of the issues he raises.

Mr. Stone was charged by indictment with one count of capital sexual battery. The indictment specifically alleged that he had placed either his penis or his mouth

upon the vagina of the victim. This incident occurred sometime between November of 1984 and November of 1985. At the time of the incident, the six-year-old victim's parents were divorced. She lived with her mother, but would occasionally spend the night at her father's home. The incident occurred while Mr. Stone was baby-sitting the victim at the father's home. Mr. Stone was the nineteen-year-old brother of the father's girlfriend.

The victim testified at trial. She was eight years old at the time of trial. She testified that the defendant "got on top of" her when she was in bed, and that this act hurt her "private." She could not define the word "private." She was uncertain whether her private was below her waist and did not remember who had taught her the word. The victim's mother, however, testified that she had taught the word to the child to describe her "genital area."

The young child also repeatedly testified that the defendant had "licked" her private. This occurred at night. She said the defendant placed a washcloth on her private before he licked it.

The first person to whom the victim revealed this incident was a girlfriend. The friend was eleven years old at the time of trial. This friend testified that she was staying at the victim's home one night when the victim told her that Mr. Stone had previously taken off her clothes and his clothes, and that he had gotten on top of her and placed his mouth on her private parts. The friend encouraged the victim to tell her mother.

The mother testified that her daughter and the friend had approached her late that evening. Her daughter told her about the incident. Her daughter also told her that the defendant had put his "private between her legs," and that she had gotten wet between her legs.

Mr. Stone testified at trial. He admitted that he had baby-sat for the victim on approximately three occasions. He denied, however, that he had ever engaged in any form of sexual conduct with her, and denied that he had ever used a washcloth on her for any purpose.

First, the defendant argues that he was entitled to a judgment of acquittal because the evidence did not establish a sexual battery. In order to establish a sexual battery, the state is not required to prove a rape or penetration. "Sexual battery" includes "oral . . . union with the sexual organ of another. . . ." § 794.011(1)(h), Fla. Stat. (1985). In this case, union merely requires contact between the defendant's mouth and the sexual organ of the victim. *See Dorch v. State*, 458 So.2d 357 (Fla. 1st DCA 1984). It was the intent of the legislature through chapter 794, Florida Statutes (1985), to protect persons from "intentional, non-consensual intrusion into [their] sexual privacy." *Surace v. State*, 378 So.2d 895, 899 (Fla. 3d DCA) (Schwartz, J., specially concurring), *cert. denied*, 389 So.2d 1115 (Fla.1980); *Grunzel v. State*, 484 So.2d 97 (Fla. 1st DCA 1986).

We are concerned by the fact that the victim could not precisely define the area of her body which she understood to be her private. Her shyness and embarrassment on the witness stand were completely natural, but they are not a substitute for direct evidence. We find, however, that the jury could reasonably infer from the evidence that the defendant made contact between his mouth and the sexual organ of the victim.

> We are not allowed to retry a case or reweigh the conflicting evidence submitted to the jury. We must limit our concern to whether, after all conflicts in the evidence and all reasonable inferences derived therefrom have been resolved in favor of the verdict, there is substantial, competent evidence to support the verdict and judgment. *Tibbs v. State*, 397 So.2d

1120 (Fla.1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

Bradford v. State, 460 So.2d 926, 930 (Fla. 3d DCA 1984), *review denied*, 467 So.2d 999 (Fla.1985).

In light of the imprecision in the young vicitm's testimony, it is possible that the evidence establishing union is partially circumstantial and hinges upon the evidence concerning the wash cloth and the mother's definition. Even if this is the case, it was the function of the jury and not this appellate court to determine whether the evidence was inconsistent with any reasonable hypothesis of innocence. *Heiney v. State*, 447 So.2d 210 (Fla.1984), *cert. denied*, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984). *See Toole v. State*, 472 So.2d 1174 (Fla. 1985); *Tsavaris v. State*, 414 So.2d 1087 (Fla. 2d DCA 1982), *review denied*, 424 So.2d 763 (1983). *See also Nickels v. State*, 90 Fla. 659, 106 So. 479 (1925). Although the weight of the evidence in this case could be far greater, we do not believe it is incumbent upon parents to teach their toddlers the sexual vocabulary of *Gray's Anatomy* in order to protect them from the lifelong psychological damage of sexual battery.

Second, the defendant argues that the trial court erred in admitting the testimony of a detective without first holding a hearing pursuant to *Richardson v. State*, 246 So.2d 771 (Fla.1971). We find that an adequate *Richardson* hearing occurred and that the trial court did not err in admitting the limited testimony.

The detective worked for the Pinellas Park Police Department and specialized in crimes against children. He had not investigated the case against Mr. Stone. He had, however, investigated a separate case in which the victim's friend was also a witness. During cross-examination of the friend, defense counsel suggested that she was confusing the two cases. The state called the detective in its main case to refute this argument. The detective testified that the cases were factually different.

The state had not listed the detective on its witness list. The defense, however, had listed the detective on its witness list.

When the state first attempted to call the detective, defense counsel objected. The trial court recognized the potential problem and, thus, conducted a hearing outside the presence of the jury. As a result of the hearing, the trial court authorized defense counsel to depose the detective during the lunch break. Following the lunch break, the trial court required the state to proffer the detective's testimony before presenting it to the jury.

The state has an obligation to disclose a rebuttal witness to the defendant if the witness's testimony is reasonably anticipated. *Lucas v. State*, 376 So.2d 1149 (Fla. 1979). This is true even though the witness is also listed by the defendant. *See Keen v. State*, 456 So.2d 571 (Fla. 2d DCA 1984). The failure to disclose such a witness, however, does not automatically require the exclusion of the witness's testimony. Instead, a *Richardson* hearing is required. *Lucas*, 376 So.2d at 1151. While the trial court never expressly found the failure to list the rebuttal witness to be a violation of Florida Rule of Criminal Procedure 3.220, in "an overabundance of caution," it assumed such a violation and conducted a *Richardson* hearing.

A *Richardson* hearing requires "an adequate inquiry into all the surrounding circumstances." *Richardson*, 246 So.2d at 775. The trial court should consider at least:

> (1) Whether the state's violation was inadvertent or willful;
>
> (2) Whether the violation was trivial or substantial; and
>
> (3) What effect, if any, the violation had upon the ability of the defendant to properly prepare for trial.

Richardson, 246 So.2d at 775.

While we find that the trial court made an adequate inquiry, it would have been helpful if the trial court had expressly made findings on the record concerning the *Richardson* issues. The transcript of the hearing indicates that the state's violation was inadvertent. The trial court regarded the violation as insubstantial because of the limited scope of the testimony. The defendant did not suggest that this testimony had any significant effect upon his ability to properly prepare for trial when he was fully aware of the witness and was given the opportunity to depose the witness. *See Sireci v. State*, 399 So.2d 964 (Fla.1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982); *Loren v. State*, 518 So.2d 342 (Fla. 1st DCA 1987).

Although we recognize that the failure to conduct a sufficient *Richardson* hearing is per se reversible, we are satisfied from a review of the record as a whole that:

> [T]he trial court made an adequate inquiry into the surrounding facts and circumstances of the alleged discovery violations to support its conclusions and satisfy the requirements of *Richardson* and its progeny.

State v. Hall, 509 So.2d 1093, 1097 (Fla.1987).

Finally, Mr. Stone argues that the trial court erred in admitting the hearsay statements of the victim to her mother and to her friend without making the specific findings of fact required by section 90.-803(23), Florida Statutes (1987). This hearsay exception for certain statements of child victims in sexual offense cases requires the trial court to conduct a hearing outside the presence of the jury to determine whether the "time, content, and circumstances of the statement provide sufficient safeguards of reliability." § 90.803(23)(a)(1), Fla.Stat. (1987). The rule also requires the trial court to make specific findings of fact on the record as to the basis for its ruling. § 90.803(23)(c), Fla.Stat. 1987); *Salter v. State*, 500 So.2d 184 (Fla. 1st DCA 1986).

In this case, the trial court conducted the hearing outside the presence of the jury. The trial court heard the proffered testimony of both witnesses. In ruling the testimony admissible, the trial court stated its observations concerning the reliability of the testimony. Although the trial court did not make specific findings of fact as to each factor which the statute provides the trial court "may consider," we believe the findings are sufficient to provide a basis for the ruling. *See Glendening v. State*, 503 So.2d 335 (Fla. 2d DCA 1987), *aff'd*, 536 So.2d 212 (Fla.1988). Of equal importance, defense counsel did not object to the sufficiency of the trial court's findings. Except in cases of fundamental error, this court will not consider an issue unless it was specifically raised as the legal basis for the objection in the trial court. *Washington v. State*, 510 So.2d 355 (Fla. 2d DCA 1987). This is not an issue involving fundamental error. *Ashford v. State*, 274 So.2d 517 (Fla.1973).

Affirmed.

SCHEB, A.C.J., and DANAHY, J., concur.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3420

HARRY EDWARD STONE,
Petitioner-Appellant,

versus

JOHN L. SHAW, ROBERT A. BUTTERWORTH
Respondents-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING

[Filed Apr. 24, 1992]

Before: TJOFLAT, Chief Circuit Judge, HATCHETT and DUBINA, Circuit Judges.

PER CURIAM:

The Petition for rehearing filed by Appellant is denied.

ENTERED FOR THE COURT:

/s/ Donald Tjoflat
United States Circuit Judge

APPENDIX G

INDICTMENT

IN THE CIRCUIT COURT FOR THE
SIXTH JUDICIAL DISTRCT OF FLORIDA,
IN AND FOR PINELLAS COUNTY

SPRING TERM, in the year of our Lord
one thousand nine hundred eighty-six

CRC8514054CFANO-D

THE STATE OF FLORIDA

vs.

HARRY STONE

SPN00351627

INDICTMENT FOR SEXUAL BATTERY

(Capital)

[Filed Oct. 22, 1986]

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, impaneled and sworn to inquire and true charge made in and for the body of the County of Pinellas, upon their oath do charge that

HARRY STONE

between the 1st day of November 1984 and the of the County of Pinellas and State of Florida, on the 4th day

of November in the year of our Lord, one thousand nine hundred eighty-five in the County and State aforesaid did, while being over the age of eighteen years, commit a sexual battery upon Cynthia Davis, a child less than 12 years of age by placing the penis or mouth of HARRY STONE in or upon the vagina of Cynthia Davis, and penetration or union being done in a lewd, lascivious or indecent manner; [N1A] contrary to Chapter 794.011 (2), Florida Statutes, and against the peace and dignity of the State of Florida.

I, RICHARD L. MENSH, Assistant State Attorney for the Sixth Judicial Circuit of Florida, have advised the Grand Jury returning the above Indictment, as authorized and required by law.

/s/ [Illegible]
Asst. State Attorney for the Sixth Judicial Circuit of the State of Florida, prosecuting for said State.

Presented in open Court by the Grand Jury and filed this 22nd day of October A.D. 1986.

KARLEEN F. DEBLAKER
Clerk of the Circuit Court

By /s/ [Illegible]
Deputy Clerk

ARRAIGNED Nov. 24, 1986, w/Plea Not Guilty, Case Set PT 12/22/86

[TD 6-9-87]

[6-12-87, Jury Verdict—Guilty, as charged]

APPENDIX H

**[Excerpts from State Trial Transcript
Dated June 9, 1987 through June 12, 1987]**

* * * *

[55] MR. SHEINIS: Only thing, we ask the Court to make a ruling outside the presence of the jury as to the hearsay witnesses we would use and those would be at this point, Reba Davis, possibly Detective Trehy and Melissa A. Boger. This is under 90.803, subsection 23, calling for a proffer.

I simply say we need a hearing conducted outside the presence of the jury as to time, contents and so forth to indicate reliability.

THE COURT: Mr. Patterson.

[56] MR. PATTERSON: As of July 1st, 1985, Judge, the Florida Legislature saw fit to change the hearsay exception in this type of case and only this type of case. In allowing hearsay to come before the jury, the Legislature at least made another test for the admissibility of this evidence where the Court has to make a finding prior to the time it's presented to the jury under the terms of statute 90.803, section 23 and it says, "Unless the source of information or the method or circumstances by which the statement is reported, indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional or developmental age of 11 or less, describing any act of child abuse, sexual abuse or other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if: Section 1, The Court finds in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement"—or in this case statements, have indicated there could be as many as three—"provide suffi-

cient safeguards of reliability. In making its determination, the Court [57] may consider the mental and physical age and maturity of the child, the nature and duration of the abuse of offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate."

Then it goes on and has another section, "Whether the child testifies or doesn't testifies."

The Legislature is telling the trial judge in this case that he has to make a finding after having a hearing, that the time, content and circumstances of the statement provides sufficient safeguards of reliability. Doesn't tell you—give you a single bit of help on how you do that.

THE COURT: All right. Give me a copy of the statute. You got that with you, what you just read.

MR. PATTERSON: Yes, sir.

THE COURT: What section is it?

MR. PATTERSON: It's in the Evidence Code. 90.803, subsection 23, "Hearsay exception", it's called.

MR. SHEINIS: Judge, only thing I want to point out of particular interest in the statute is it's not otherwise admissible. The young girl who is the victim will, of course, be testifying and any [58] statements by her to these other people—I wonder in view of the Court's past rulings in other cases, if the Court would even feel this is not otherwise admissible even without this.

THE COURT: Well, she is going to be here and testify and can be cross-examined.

MR. SHEINIS: Yes, sir.

THE COURT: And recalled and she made these statements to the other witnesses?

MR. SHEINIS: Yes, sir.

THE COURT: Well, basically that falls under another exception which makes it totally admissible but I tell you what. Better to do it in an over-abundance. In light of that statute, I think you better proffer it.

MR. SHEINIS: Exactly which part do you want to proffer? The witnesses who would be testifying?

THE COURT: What could be call hearsay if you didn't have the victim.

MR. SHEINIS: Okay.

THE COURT: You understand what I am saying? That's what you're driving at, Bill; right?

MR. PATTERSON: Judge, it doesn't give any guidelines, whether the victim is here or not and testifies or not.

[59] THE COURT: Well, I know that.

MR. PATTERSON: It tells the Court, you've got to have a hearing.

THE COURT: We're going to have it. I want to know exactly whatever you think is going to be hearsay on this. Let's just do it.

MR. SHEINIS: Judge, we will go ahead, call Reba Davis, one of the witnesses. Another one we have is Melissa Boger. She is 11 years old, Judge. Again, I don't think that she should subjected to testifying that many times. It's hard enough, even though you're not the victim, to testifying in the actual trial. I don't think—

THE COURT: I don't see any exception there. Get her.

MR. PATTERSON: Another thing to bring to the Court's attention. You withheld ruling concerning our use of the facts that there are two other sexual battery cases which may be related.

THE COURT: Let me hear.

I will make a ruling on that as soon as I hear you get into it on this proffer.

* * * *

[109] MR. PATTERSON: Judge, unfortunately, the act of the Legislature gives the Court no help at all how you make this determination, as is usual.

THE COURT: That's what's call the Florida Statute.

MR. PATTERSON: Understood. How do you go about making sure that there is sufficient safeguards to

allow hearsay evidence to come before the Court? What I think the Court ought to consider in this case is whether or not what she has told is material in this [110] case. What she has told to them is not sexual battery. There is no evidence from what she said of penetration or union because the sketchiness of what she says doesn't go to any of the elements of this crime. And I think that may be considered by the Court also as an item of materiality of these out-of-court hearsay statements.

I am sorry I can't be of help to the Court in any specific way on how you make this judgment anymore than reading the Statute.

MR. SHEINIS: Judge, in response to what Mr. Patterson has said, I don't think materiality is what's at issue here. We're not expected to have Melissa Boger or even Reba Davis be the interrogator and know what the elements of a crime of sexual battery are and ask Cindy specifics in relation to that. It's simply what the statements are and goes to reliability of the statements.

There is nowhere in Evidence Code, Section 90.803, subsection 23, that talks about how the statement has to be specifically termed to the elements of the charge.

THE COURT: But you notice the case talked about materiality. The case the State put on my desk talks about materiality. I did pick up on that.

[111] Don't reargue. I am making my comments. Sit down.

As far as I am concerned on this, it's interesting the mother says how she can't believe a ten year old child and how she believes a six year old. I thought that rather interesting. When Mr. Patterson cross examined about statements, how can you believe a ten year old child, I started to say, how are you supposed to believe a six year old child.

The next thing that concerns me is just how much influence this mother had over Melissa. I went into my questions and she was talking she over heard this, over heard that. I don't have any doubt Melissa is a sharp girl. This girl is on the ball. We know that.

I am going to allow them to testify. I am going to allow you to cross them on all three cases, allow you wide latitude and I am out of it. Okay. What else?

* * * *

[121] Q. How old would Cindy have been at that time?

A. Cindy was six.

Q. How old was Melissa?

A. Melissa was eight or nine.

Q. Go ahead.

A. They came into the room and woke me up and they had something to tell me. Melissa said Cindy needed to tell me something and the girls wouldn't say exactly what it was. So, they went out into the other room and wrote me a note and the note said, "He laid on top of me." From there, I asked Cindy who and when did this happened and it was at her dad's.

MR. PATTERSON: Could we have a continuing objection to hearsay testimony please.

THE COURT: Sustained, as far as your objection continuing.

MS. BAILEY: I am sorry, Your Honor.

THE COURT: He has—in the record, he has a continuing objection as to hearsay.

MS. BAILEY: I understand.

Q. (By Ms. Bailey) Could you describe how Cindy [122] was acting as she was talking to you?

A. Sse was embarrassed and upset.

Q. What about her made you think she was upset?

A. Through the conversation, she cried.

Q. After you got the note and read the note, then what happened?

A. Then, I asked Cindy a few questions to find out it happened at her dad's and it was Harry.

Q. Who is Harry?

A. Harry Stone, Cathy's brother.

Q. Cathy—the jury doesn't know these people?

A. Cathy's is Cindy's father's fiance.

Q. The defendant would be her brother?
A. Her brother, Harry Stone.
Q. How did Cindy have contact with Harry Stone?
A. She would be left over at her father's to be baby sat and Harry would apparently go over there.
Q. Did you know anything about this babysitting?
A. No, I didn't.
Q. What did she tell you specifically about what happened—what had been happening?
A. She said that when her dad and Cathy went out, Harry was baby-sitting.

* * * *

[123] Q. What did she tell you had happened after he took his clothes off?
A. Took his clothes off, laid on top of her and put his private between her legs.
Q. That term "private" to Cindy, what was your understanding?
A. His genital area.
Q. How did she learn that term?
A. I taught her.

* * * *

Q. What else did she tell you had happened between her and Harry?
A. In trying to find out if he actually committed the act, I asked her if she had gotten wet or anything like that and she said she had gotten wet.
Q. Where had she gotten wet?
A. Between her legs.
Q. What else did she tell you?
A. That particular night, not a whole lot of anything else.

* * * *

[126] A. Had I had any other conversations with Cindy?
Q. Right.
A. Yes, several.

Q. What did she tell you in those conversations?

A. At one point, she told me that one of the incidents when she had been left there with Harry, that he had put his mouth on her private area. A lot of our conversation was through counseling and me trying to help them make Cindy understand that she wasn't at fault.

* * * *

[129] Q. Remember when your deposition was taken here in the courthouse?

A. Yes, sir.

Q. December 18, 1986?

A. Yes.

Q. State Attorney's Office was present?

A. Yes.

Q. And I was present?

[130] A. Yes, sir.

Q. Court reporter was here?

A. Yes.

Q. You remember this question and your answer to that question. "Question—

MR. SHEINIS: What page?

Q. (By Mr. Patterson) Page 16, line 20:

"What did she tell had happend the night before?

Answer: Harry laid on top of her while Mandy was in the bed with her. He took his pants off and took her pants off, and laid on top of her while Mandy was in the bed with them. And that was for the most part what I had gotten out of her."

Was that your answer to that question?

A. Yes, sir.

Q. Going on: "Question: Is that what—essentially what she said?

Answer: Yeah, for the most part.

Question: Did she say anything else?

Answer: As much as I can remember, I—it's really been so long ago, and I was in such a state of shock, that I really couldn't tell you what all was said exactly."

Is that your answer to those questions?

[131] A. Yes, sir.

Q. I believe you indicated on Direct Examination that you're the one that talked to her about being wet?

A. Yes, sir.

Q. Did you suggest that to her, or did she talk about it herself?

A. If I am not mistaken, that may have even been said through counseling. I can't remember exactly when it was said.

* * * *

[141] Q. Did she say anything to you about if he put his mouth on her anywhere?

A. She said that he put his mouth on all her private parts.

Q. And did you kind of ask her that? Did you say, did he put his mouth on your private parts or did she tell?

A. She said he was being gross. I think she said it on her own. I am prettey sure she said it on her own.

* * * *

[147] Q. Let me ask—tell me what Cindy told you Harry did to her?

A. She told me that Harry got on top of her and she told me that he had his mouth by her private parts.

Q. That's what she told you in that first conversation?

A. I think she told me that he had his mouth by her private parts. I think I remember her saying that. I am pretty sure she said that.

Q. Did she say how many times it happened?

A. She said it happened more than once, I think.

Q. Page 17, line 19:

"Question: Did you say when that happened?

Answer: Huh-uh.

Question: So, her words to you are that he got on top of me once?

Answer: Yes."

* * * *

[149] Q. Did she say anything about what he was doing when he was on top of her; what did he do?

A. She said that he was putting his mouth by her private parts. That's all she told me.

Q. Page 18 line 11:

"Did she say what he was doing when he was on top of her? What did he do?

Answer: I don't remember if she told me. But I don't think he did."

* * * *

[153] Question: She woke up when he was on top of her, but she never told you exactly what he may have done while he was on top of her; is that right.

Answer: No.

Question: She did not, is that what you are saying?

Answer: Yes.

Question: And she only talked about one incident?

Answer: Yes."

* * * *

[155] Question: Did she go into anymore details about what had happened when Harry was on top of her?

Answer: No.

[156] Q. Page 29, line 23:

"Has she ever told them, that is, is there any indication from anything she said that this happened anymore than just one time?

Answer: No.

It's just been once; right?

Answer: Yeah."

* * * *

[168] MR. PATTERSON: Judge, my client's family brought to my attention that for at least 15 to 20 [169] minutes during the last recess, the two girls were together out in the hall.

MR. SHEINIS: Melissa knows not to talk about the case. We were out there a large part of the time. I never saw her talking about the case. We had our victim/witness assistant who was up here, sitting with Melissa the whole time. She knows Melissa is not supposed to talk about the case. There is no indication to me that they have.

THE COURT: Okay. Do you want me to bring them in and inquire.

MR. PATTERSON: I just wanted to tell you.

THE COURT: I am confident we are all right now but Richard—

MR. SHEINIS: I will go out and tell them again.

THE COURT: Melissa is one sharp little cookie.

* * * *

[171] MR. PATTERSON: May we approach the bench?

BENCH CONFERENCE

MR. PATTERSON: My client's family again has brought to my attention that these girls are back together again. In fact, together again in the witness room.

MR. SHEINIS: They're playing cards. I have taken—

THE COURT: My instruction was real clear. I am going to deal with you accordingly.

Let's proceed.

* * * *

[173] Q. Now, there in Pinellas Park, where you live, who do you live there with?

A. My mom's husband and my mom and me.

Q. Where does your dad live?

A. I don't know.

Q. Couple years ago, when you were six, did you go visit your dad a lot?

[174] A. Yep.

Q. When you would go to visit your dad, would you ever have a baby-sitter?

A. Yes.

Q. Who would your baby-sitter be?

A. Harry.

Q. I would like you to look around the courtroom. Do you see him in the courtroom?

A. Yes.

Q. Could you tell me what color he is wearing and point him out to me?

A. Gray.

MS. BAILEY: May the record reflect the witness has identified the Defendant?

THE COURT: What says Defense?

MR. PATTERSON: No objection.

THE COURT: Let the record so reflect.

Please proceed.

Q. (By Ms. Bailey) When Harry would baby-sit, how many times—can you give me a guess how many times that he would baby-sit you?

A. I don't know.

Q. Would it be more than one time.

MR. PATTERSON: Objection, leading.

THE COURT: Sustained.

[175] Q. (By Ms. Bailey) Where would your dad be when he would be baby-sitting?

A. I don't know.

THE COURT: Attorneys, approach the bench.

BENCH CONFERENCE.

THE COURT: I understand as far a leading nature is concerned. However, I realize she is a real small child and appears to be a little shy. I will allow some latitude but I don't want you putting total words in this child's mouth.

MR. PATTERSON: I would point out, she is so susceptible to influence.

THE COURT: I understand.

MR. PATTERSON: We stick by the rules as much as possible.

THE COURT: That's what I am trying to say.
MS. BAILEY: I don't plan on leading this witness.
THE COURT: Thank you very much.

BENCH CONFERENCE TERMINATED.

Q. (By Ms. Bailey) When you would go over to your dad's and Harry—would you ever spend the night?
A. Yep.
Q. Do you know about how many times?
A. No.
[176] Q. Would you take clothes to wear the next day?
A. Yes.
Q. Would you take something to sleep in?
A. Yes.
Q. What would you take to sleep in?
A. A nightgown.
Q. Would you use that nightgown to sleep in?
A. Yes.
Q. Where would you sleep when Harry baby-sat?
A. In Mandy's bed.
Q. Who is Mandy?
A. My little sister.
Q. Was she little—how old about was she then, back when you were six?
A. I don't know.
Q. Was she a big girl, little girl? Give us a guess.
A. She was little.
Q. Who else slept in the room besides you and Mandy?
A. Nobody.
Q. When Harry would baby-sit overnight, would he ever take you anywhere?
A. Yes.
Q. Where would he take you?
[177] A. The mall.
Q. Why would you go to the mall?
A. He wanted to go look for girls.
Q. Did he ever have a friend that came with you?
A. Ricky.

Q. Do you know Ricky's last name?
A. No.
Q. When Harry would baby-sit overnight, did anything ever happen that made you feel uncomfortable?
A. Yes.
Q. What was that?
A. He got on top of me.
Q. Where?
A. When that happened? Mandy's bed.
Q. Where was Mandy?
A. In bed.
Q. What was Mandy doing when he got on top of you?
A. Sometimes she was sleeping.
Q. Anything else?
A. And sometimes when she went—she kept turning around and Harry kept saying turn back around.
Q. Why was that?
A. Because he was getting on top of me.
Q. What would Mandy do?
A. She would just keeping turning back around.
[178] Q. When he would get on top of you, what would that feel like?
A. It would hurt.
Q. Where would it hurt?
A. On my private.
Q. What does your "private" mean?
A. I don't know.
Q. Is it below your waist?
A. I don't know.
Q. Who taught you the word "private"?
A. I don't remember.

* * * *

[179] Q. What was that?
A. He would lick my private.
Q. Where would you be when this would happen?
A. Mandy's bed or on the couch.
Q. How many times did that happen?
A. I don't know.

Q. Would that be daytime or nighttime?

A. Nighttime.

Q. When he would lick your private, would he do anything else?

A. Put a wash cloth on before he does.

Q. On what?

A. On what? My private.

* * * *

[186] Q. But you never told your friends maybe six, eight, ten times, what happened?

A. No.

* * * *

[189] Q. At the bottom of page 8 of the deposition, line 25:

"Do you have any idea how many times it would have happened?"

And your answer: "I only remember two times."

Is that still right?

A. No. It happened more than two.

Q. When you said you only remember two times, you are remembering more now or what?

A. I only remember two times.

Q. Did the same thing happen every time?

A. No.

Q. When was the first time it happened?

A. When he was driving.

Q. He was driving in the car or truck?

A. In my dad's truck?

Q. And it happened in the truck?

A. I don't know.

Q. When was the next time it happened; what occurred?

A. He said he would buy me something if I went to [190] look for a girl.

Q. Went to look for a girl. Again, he is talking about a girl his age; is that right?

A. I guess.

Q. You went to the mall?

A. Yes.

Q. Was Ricky there?
A. Yes.
Q. Did something happen in the truck?
A. I don't know.
Q. Did anything ever happen outside of your dad's home?
A. No.
Q. Nothing happened in the truck; right?
A. No.

* * * *

[191] Q. Page 12, line 5, I asked you this question: "Do you remember what happened in the living room? Answer: No."
Remember giving that answer?
A. Yes.

* * * *

[193] Q. (By Mr. Patterson) That same page, page 12, line 24, my question:
"Did he do anything in the living room?"
And your answer was: "I don't know."
Is that still correct?
A. No.
Q. You said he got on top of you in the bedroom?
A. Yes.
Q. Did you have your clothes on?
A. I don't remember.
Q. So, you don't know if you had your clothes on or your clothes off; is that correct?
A. No.
Q. Wait a minute. Is that correct, you don't know whether you had them on or not?
A. No, I don't know.
Q. Did you have on a nightie and some underpants?
MS. BAILEY: Objection. Asked and answer. Victim already answered, Judge.
THE COURT: Overruled.
A. Yes.

* * * *

[194] Q. (By Mr. Patterson) You know what Harry did when he got on top of you?

A. No.

Q. Do you remember whether he took your underpants off or not?

A. No, I don't remember?

* * * *

[196] Q. Where did this word "private" come from?

A. I don't know.

Q. Is that something you say or somebody told you about or what?

A. I don't know.

Q. Did your mother ever talk to you about what you were supposed to say?

A. I don't know.

Q. About Ron Bauer, did he ever tell you what you were supposed to say?

A. I don't know.

[199] Question: Do you know what Harry did when he got on top of you?

Answer: No."

But what he didn't read was:

"Question: Did you feel anything?

Answer: Yes.

Question: When Harry got on top of you?

Answer: Yes.

Question: What did you feel?

Answer: His private."

That's all the questions pertaining to that part; isn't that right?

A. Yes.

* * * *

[269] Q. Harry, did you do the things to Cindy Davis that she says you did?

A. No, sir I did not.

Q. You ever get in bed with Cindy Davis, lay on top of her?

A. No, sir, I did not.

Q. Did you ever rub yourself against her in her bed?

A. No, I did not.

Q. Did you ever take her clothes off?

A. No, sir.

Q. Take her pants off or nightgown off?

MR. SHEINIS: Object to leading the witness through his entire testimony.

MR. PATTERSON: Not leading.

Q. Did you ever take her pants off, is the question?

THE COURT: All right. Proceed.

A. No, I didn't.

Q. (By Mr. Patterson) Did you ever do the things that she said you did in the living room?

A. No, sir.

Q. Either in the living room or in the bedroom, did [270] you ever put your mouth on her vaginal area?

A. No, sir, I didn't.

Q. Did you ever use a wash cloth to wash her off?

A. No, sir, I did not.

* * * *

[275] Q. Isn't it true, that in approximately the end of October of 1985, you went to California; isn't that true?

A. I have no date when I left.

Q. You did go to California; didn't you?

A. Yes, I did go to California.

Q. And you didn't baby-sit for Cindy Davis; isn't that true?

A. I don't understand your question.

Q. After you went to California, you obviously did not baby-sit for Cindy Davis; did you?

A. No, sir.

Q. And while you were in California, you still [276] maintained contact with your parents; right?

A. No, sir.

Q. You never spoke to your parents when you went to California?

A. No, sir.

Q. Never spoke to them on the phone?

A. No, sir.

Q. Never wrote a letter to them?

A. I do not write, sir.

Q. Never received a letter from them?

A. No, sir.

Q. You never had any contact with your sisters at all?

A. No, sir.

Q. You just took off to California and didn't speak to anyone. Is that what you're telling us?

A. I left with one of my sisters.

Q. You never spoke to anyone at home. Is that what you're telling us?

A. Yes, sir.

Q. You never up and decided to go to California?

A. I already previously planned to.

Q. Tell us exactly when you planned to?

A. Me and my sister had made plans. My sister made plans originally, asked me to go and I went with her.

[277] Q. You knew the police wanted to talk to you?

A. No, sir, I did not.

Q. Never were told about that by your parents that the police were looking for you in connection with a sexual abuse on Cindy?

A. Not until I returned.

Q. You came back a full year later; isn't that right?

A. Correct.

Q. Your sister, you said you were with, she could read; couldn't she?

A. Yes, sir.

Q. She never said anything to you about you being wanted for questioning by the police. Is that what you're telling us?

A. Yes, sir, I am.

Q. But she could have phoned your parents; right?

A. If she did, never told me about it.

Q. Written a letter to them, received letters from them?

A. I have no idea what she got, sir.

Q. You went to California, you are telling me, one entire year and never had any contact with your family other than your sister that was with you?

A. Yes, sir.

[278] Q. Before you went to California, you lived at that house with your parents; right?

A. Yes, sir.

Q. That's the same place you moved back into when you came back?

A. Yes, sir.

Q. Consider yourself maybe pretty close with your parents?

A. Yes, sir.

Q. But you never spoke to them for an entire year?

A. Correct.

Q. Never spoke to your sisters for an entire year?

A. Correct.

Q. Before you left for California, you knew that Cindy had accused you of these acts against her; isn't that true?

A. Yes, sir.

Q. But you went to California anyway?

A. Yes, sir.

Q. You never talked to the police?

A. The police never came to my house, never questioned me.

Q. You never—go ahead.

A. Never attempted to as far as I knew.

Q. You never went to the police station to talk to [279] any police; did you?

A. No, sir.

Q. But you knew you were being accused of these sexual crimes involving Cindy Davis?

A. Cindy never accused me that I know of. My father asked me a couple questions about it.

Q. You knew that you were being accused of that crime; isn't that correct?

A. To an extent.

Q. That is when you went to California; isn't that right?

A. No, sir.

Q. You went to California right after that; didn't you?

A. No, sir.

Q. Tell us about how long you stayed in town before you went to California, then?

A. Approximately two or three weeks.

Q. Two to three weeks after that?

A. Correct.

Q. You went to California?

A. Correct.

Q. You lived in your house for those two to three weeks with your parents; didn't you?

A. Off and on, yes.

[280] Q. But said no one ever told you about the police looking for you?

A. Police never came to me.

Q. I am asking you if you ever were told even by your parents that the police were looking for you in connection with the sexual crimes against Cindy Davis?

A. No, my parents did not.

Q. Your parents knew you were going to California; didn't they?

A. Yes, sir.

* * * *